Research Paper | Law | E-ISSN No : 2454-9916 | Volume : 4 | Issue : 2 | Feb 2018

# MODULATION AND ANALYSIS OF PENALTY CLAUSE IN IRAN'S LAW AND JURISPRUDENCE

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## ABSTRACT

According to the principle of contracts freedom, the principle of autonomy requires that the contract's parties can conclude the contract in any way they wish. And in this way they are not obliged to choose the prefabricated forms in conditions, works, as well as the guarantee of the performance of the contracts. And they can include any condition which they would in accordance with (Article 10 of the Iran Civil Code): Provided that it does not be against the law or contrary to the nature of the contract. One of these conditions, which the parties are inserted while contracting with the aim of ensuring the implementation of commitments, is penalty clause condition which is of great importance in jurisprudence and law of Iran. According to research conducted and the fact that the nature of penalty clause is damages in Iran's law and jurisprudence, as well as the question that whether modification possibility of penalty clause exists in Iranian law and jurisprudence or not, it should be said: Contrary to the jurisprudence's views, referring to negation of intolerable hardship rule (Osr Va Haraj) and modification possibility of penalty clause, Iran's legislative policy is in line with the French law in favor of the prohibition on penalty clause's modification. And the fact that whether there is possibility of damages excessive to the penalty clause in Iran's law or not, is not possible in the law of Iran due to the research conducted and it is possible in jurisprudence.

## 1. INTRODUCTION:

Penalty clause that is considered to be conditional damages, fixed damages, or contractual damages is that the parties may determine a compensation for the damage caused resulting from breach of contract at the time of the conclusion of the contract. In fact, this is a condition with two weapons with two different functions for two different time periods. At the time of contract execution, it acts as a means of guaranteeing the fulfillment of the commitment and the threatening of committed person to implement the commitment. But at the time of contract breach, it is used to compensate for the damage caused by the violation and punish the committed offender. In this article, we are going to examine the possibility of modifying and analyzing the contracts and penalty clause in Iranian law and Islamic jurisprudence. And is there any possibility of its modifying and analyzing in Iranian law and jurisprudence? Are modulation and analysis in one sense? And finally, whether there is the possibility of claiming the penalty clause in addition to damages in Iranian law and jurisprudence or not? And given that in Article 230 of the Iran's Civil Code (If the contract is conditional upon payment of damages in case of violation of the offender, the ruler cannot condemn him to more or less than what is required) the legislator has taken the right of moderation from the judge. And by examining whether there are violations and differences in our law and the laws of countries such as Egypt, Syria and Iraq and etc., or not? The offenses and differences with our law, we intend to discuss this issue in detail in this article.

**Definitions: 1**

Jurisprudence in the word means knowing and understanding. In other words, it means to understand hidden things. Raqib has made sense to find out from the present information to the absent information.

In the term: So that, jurisprudence is a science. In science, the inference of religious law is applied based on the vote and ijtihad of jurisprudence. Jurisprudence in the terms of religious authorities: The word jurisprudence gradually, in the term of the religious authorities, especially the jurists, is dedicated only to the "Feqh al-Ahkam", and nowadays the word "jurisprudence" is considered only as the practical issues of Islam from taboo and similar to them. In other words, the religious authorities of Islam, inspired by some traditions, have divided Islamic teachings into three parts: "beliefs", "ethics" and "practical laws". They used the word "jurisprudence" only as "Islamic law and practical laws".

Definition and the nature of the penalty clause: penalty clause is the amount specified by the parties prior to the occurrence of the damage caused by the failure to execute the original contract or the delay of its implementation by agreement. This agreement may be in the main contract or in accordance with an independent separate agreement. And it also seems that in the judicial procedure, this article adopted by from Article 1152 of the French Civil Code, considering that the Iran's legislator has damaged in an amount specified, the argument about whether it can be considered as penalties for failure to fulfill obligations, is excluded. The advantage of this condition for the oblige is that exempts him from the proof of the damage principle and the amount of it. The modulation of the {Persian dictionary of Moein} in the word means lowering, straightening down, tempering and etc. And in the term, it is assumed as a something that has a possibility to increase or decrease something. Possibility to modulation in a penalty clause means that whether there is possibility to increase or decrease the amount of penalty clause or not? And what has been suggested in the title of this article is whether it is possible or impossible to modify the penalty clause or not? The Linguistic Concept of analyzing (Persian Dictionary of Moein) means the meaning of excluding something, separating the pieces of a compound object. And, considering the Iranian civil law and Islamic jurisprudence, we want to see whether there is possibility of modifying and analyzing the penalty clause or not? And is there any difference between modulation and analysis? And in this article, we try to clarify the modulation and analysis of penalty clause in the Islamic jurisprudence and law by explaining each one.

## 2. MODULATION OF PENALTY CLAUSE:

In this issue, the dispute starts with its title. In Iran's law, although the civil code has not given a name to an agreement between the parties on damages, however some of the other laws, including the provisions of Articles 34 (4) and (5) of Article 34 of former law of registration, use the term penalty clause, and the judicial procedure and doctrine became familiar with this title.

In French law, the agreement arising from a breach of contract is always referred to as a criminal condition. Considering that its equivalent value is greater or less than actual damage (Samawati 124: 1390)

Although the monitoring on exorbitant and unfair damages conditions in both Common law and Roman-Germanic law has a long history, but the abuse of these clauses in contracts among the businessman and consumer was the introduction of social movement and the judicial movement to monitor on abusive conditions in the second half of the twentieth century.

Gradually, consumption contracts were excluded from the general terms of contracts in many countries, including France and England, and were themselves subject to separate regulations and criteria.

Also, in our country, within the scope of the electronic commerce law in Article 46 of this law, applying unfair conditions to the detriment of the consumer has been the subject of a specific ruling and has been discredited.

Although, there is no regulations or guidelines to identify unfair conditions and to prevent the occurrence of severity in judicial proceedings (Husseinnezhad, 124: 1380), the process of government and the judiciary's intervention is continued outside the specific framework of consumer's contracts in the French to monitor the penalty clause and its compliance with fairness and social justice. But this process has conflicts and problems that make it difficult to achieve the goals resulting from modulation of penalty clause.

The judicial procedure refrained from generalizing judicial supervision to similar conditions with the cruelty of injustice, by an inevitable observance of the stability of the contract by considering the modulation of penalty clause as an exception. And it has restricted offensiveness to the government's will by stablishing criteria and regulations. The criteria of judicial procedure for intervention and modulation of penalty clause allows the parties to consider the judicial control possibility of conditions as a contract's adjustment, and only by changing the terms and phrases keep their agreement from the judicial intervention.

The development of various countries in the acceptance of the modulation of the criminal, frivolous and exceptional conditions that have been imposed clearly illustrates the difficulties and problems of intervention in private contracts. So

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that, legal systems in a permanent struggle sometimes tend to conditional modulation and sometimes tend to stabilize contractual relationships. The pure adherence to the rights of other countries in accepting the criminal condition and neglecting social and economic considerations not only does not deserve it, but also its consequences jeopardizes the fairness, stability, and predictability of the contract.

**2.1. Forms of Modulation Penalty Clause in Iran's Law:**
One of the most important results of the principle of the will and compliance of the contract with the common intention of the parties is that the private contracts are a two-ways law that should be respected. This rule has become a principle in our rights: If Article 219 of the law provides: (1)" an agreement which had been established in accordance with the law, is binding between the parties and their deputy".

Therefore, only one of the two parties cannot change its contents by the unilateral will. The legislator or the judge has no right to modify it. But the intervention of some factors, such as the inequality of the financial conditions of the parties, the exclusivity of the production and selling some of the productions by large manufacturers, and in particular the lack of knowledge of individuals from the results of the conditions included in the contract cause doubts toward applying this principle. And the penalty clause condition is also of a contracts which, is more likely to be skeptical in the view of the considerations mentioned above. Therefore, it can be said that there is no contract for the provisions to remain unchanged. But by considering the causes and factors mentioned above, each contract may be changed under the influence of various voluntary or compulsory variations and so the modulation of the contract by its reason can be divided into the contractual; legal and judicial. {Katouzian 73: 1388}

**2.1.1 Contractual Modulation:**
Each contract comes from an agreement of the will of the parties. Therefore, the two wills that created them can make them emblematic; Or, for other reasons, modify it: that it can be referred to as corrective contracts. Therefore, the parties can modify and amend the text of the contract and foresee them, or after the conclusion of the contract they will be satisfied in the form of a separate contract: Therefore, there is no doubt about the influence and validity of the contract modifications; whether the contract is original or as an amendment to the separate contract; Because this kind of modulation is also due to the will of the government and the common intention of the parties. Therefore, the penalty clause condition that the parties placed on the contract in consent, and the parties can make a condition at the time of the formation of the contract, is from the contracts and the parties can bet at the time of the contract, if too much time passes or due to the high factors and economic fluctuations such as devaluation; and the amount of money is deemed to be very small, the other party may modify the mentioned amount and comply with the conditions of the time, justice and fairness, and the credit of such a condition is a return to principle of will's sovereignty.

Therefore, it can be concluded that the contractual penalty clause is modifiable contractually, whether the parties predicted the main modification contract, or later agree on the modulation of the amount of the contract.

**2.1.2 Legal Modulation:**
The Iranian legislator explicitly states in Article 232 of the Civil Code that the penalty clause is not modulated. According to this article, the ruler cannot condemn him more or less than what is sentenced. While, as noted in the preceding questions, the above article has been adapted from Article 1152 of the French Civil Code. As if in the recent country, due to developments in the judicial process, the French legislator subsequently accepted the modulation of unfair penalty clause under the law of June 1975; But Article 230 of the Civil Code has never undergone this transformation. In the legal doctrine, though, most lawyers (Husseinnezhad: 157: 1380), according to Article 230 of the Civil Code, consider any modulation of penalty clause to be explicitly opposed to the mentioned article; But some lawyers may find it possible to modifying this provision in Iranian law. Dr. Qa'em Maghami writes in this regard: If the penalty clause condition can be seen from the examples of Articles 9601 and 975 of the Civil Code, i.e. regardless of the liberty, insofar as it is inconsistent with good morals; indeed, the enormous amount of penalty clause will jeopardize the conditional economic situation. The court can modify and reduce the amount of penalty clause to prevent such risks. {Qa'em Maghami: 274: 1383} But accepting such a theory is far more difficult than mind; Because the condition is related to the non-opposition to the contract (which is a penalty clause condition and also of a private contract) with good morals and a general opinion of the terms of the penalty clause. And if, in the matter of credit, the condition of the penalty clause was passed, the absence of these conditions would invalidate the condition and not reduce it. However, some other legal scholars rely on the idea of modulating the condition of the penalty clause by Article 4 of the Civil Liability Law, and according to this article, stipulates that: The court can reduce the amount of damages in the following cases: 1 ..... 2 ..... whenever the occurrence of damage is due to neglect that it is legally negligible and its compensation led to the hardship of the importer of losses 3 ..... The provisions of clause 2 of this article also include fixed contractual damages.

In our opinion, despite the openness which is in Article 230 of the Civil Code, and the legislator in accordance with article mentioned, considers that any modification of the penalty clause condition is inappropriate, it would seem that the penalty clause condition can be modified by reference to the article 4 of the Civil Liability Act, which refers to the term civil liability and includes both contractual and contractual liability: Because the testimony is not based on the abovementioned provision, and on the other hand, the inserted (intolerable hardship (Osr Va Haraj)), states a general ruling that can be extended to other cases of ("contractual liability"). Therefore, in order to modify the penalty clause in Iran's law by referring Article 4 of the Civil Liability Act, the two conditions mentioned in paragraph 2 of the above articles shall be added that the lack of any of them would rule out adjustment of the condition; However, the conditions that their community requires are: 1.The occurrence of damage caused by neglect, which is a mystic is negligible. 2. Compensation of damages led to the hardship of the importer of losses.

**2.1.3 Judicial Modulation:**
In a judiciary that has always been recognized as one of the most important sources of law in all legal systems, even is a primary source in English law (Common law); it usually plays an important role in overcoming legal deficiencies and defects. And sometimes even lawmakers have been reforming the law by adopting the judicial procedures developments; However, in the judicial developments of French law in relation to the issue under discussion and the modulation of the penalty clause led to the amendment of the law and the acceptance of the mentioned condition's modulation in 1957. But, in judicial proceedings, despite the adoption of Article 230 of the French Law, Article 1152 of the year 1804, there has never been a change regarding the modulation of penalty clause condition. Therefore, with investigations conducted in a judicial proceeding, no modulation-based voting has been found. However, it is worthy that the courts of our country, as well as the courts of other legal systems, make a development in this regard, and, in addition, in Article 4, paragraph 2 of the responsibility law, it is also to be considered in special circumstances.

**2.2 Conditions Governing the Modulation of Penalty Clause in Iran's Law:**
Documentarily, under the Article 230 of the Civil Code, provided that if the penalty clause condition has been included in the contract, the judge will not have the discretion to modify it, and if the actual damage is less than or more than the required amount, the defendant will be fined to pay the agreed amount. {Katouzian: 70: 1380} In this way, it is considered that necessity of compensate for all losses and to establish a balance between the damages and the amount of penalty clause is a supplementary principal, and the parties are able to agree on its amount. Article 1226 of the French Civil Code introduces the penalty clause condition as a condition by which a person is obligated to pay a sum to guarantee the performance of a contract. And Article 1152 of this law stipulates that (Whenever a contract is stipulated that, each party who fails to fulfill his obligation, should pay a damages, the obligee has no right to claim more than what has been ordered and the obligated party cannot pay less than it.) (Jafari Langroudi: 123: 1382} However, in 1975, a law was passed in which authorizing the judge to modify the penalty clause condition if it was disproportionate. That is, if the amount is defined as a penalty clause condition in a contract and is excessive in relation to the principle of the contract, it will reduce it to the interest of the obligated party and, if it is unimportant, would increase to the interest of the obligee.

However, in French law, the judge is prohibited from modifying the principle of the contract and in the law and judicial procedure, the judge did not allow interference in the contract, except in exceptional cases. The remarkable point is that in French law, regarding the contracts in which one of the parties is the government, governmental organizations or municipal corporation, it is allowed to modify the contract by the magistrate. In the socialist countries, the condition of penalty clause is the conventional utility of the economic contract. Most socialist countries, in most cases which the breach is located in a contract, the law has predicted the penalty clause. In the former Soviet Union, the penalty clause condition was, in principle, also a punitive aspect. It was also used to determine the fixed amount of damages.

Compensation in former Soviet Union law is a private fine that is added to the execution of the contract in such a way that even one of the parties to the contract cannot exempt the other party from payment.

In German law, Articles 339 to 345 of the Civil Code and Article 348 of the Commercial Code are devoted to the condition of the penalty clause and its situation. Article 339 of the German Civil Code stipulates (I) If the obligated party is obligated to pay a sum as the penalty clause to the obligee, when the obligation is breached, the penalty clause be recorded, also if the obligation be to leave the action as soon as the action is carried out in the direction of the breached obligation, the penalty clause is recorded))

It is noticeable that the concept of the penalty clause is very close in all legal systems and, in a way, all the definitions provided are useful in a sense. Thus, firstly, that the condition of the penalty clause is of a contractual nature and is considered a stipulation, and therefore the willingness of the parties to fulfill that condition is considered necessary.

Secondly, the main purpose to deduct the penalty clause in the contract, is the necessity of obligated person to perform contractual obligations, and, the breach of a commitment from his area, he will be compensated without needs to prove

the elements of the claim for damages.

Thirdly, it is a fixed amount and therefore exempts the judge from assessing the costs and expenses incurred by the obligated party due to defective obligations. Thirdly, it is a fixed amount and therefore exempts the judge from assessing the costs and expenses incurred by the obligee due to breach of obligations.

**2.2.1 The Creditor's Interest in Fulfilling Part of the Obligation:**
In this hypothesis, the judge can exempt the debtor from the payment of part of the penalty clause, on the basis of the mutual intention of the parties and the possibility of parsing the commitment. Of course, the time decomposition is possible when the principle of a commitment can be separable, since the condition of the penalty clause as a subordinate obligation is a function of the underlying obligation.

Thus, even if a major part of the contract is executed, but no interest gains for the obligee, it will not be possible to decompose and reduce the penalty clause. For example, if the contract was about a plane which has been delivered to the buyer, but a very small piece of it has not yet been installed, in such a way that the exploitation is abandoned, it seems that the implementation of a large part of the contract that is delivered to the aircraft cannot meet the buyer's demands, and therefore, in the recent case, the obligation form in such an agreement is considered indissoluble. {Jafari Langroodi: 32: 1382}

So, whenever the penalty clause condition be appointed by the non-fulfillment of an obligation, only when the implementation of a part of the obligation is effective in modifying it, that the provisions of the contract indicate the effect of the part of obligation in penalty clause, and otherwise the obligated person will be liable for the payment of the penalty clause.

**2.2.2 Modulation of the Penalty Clause on the Assumption of Proving the Obligated Person's Fault:**
Considering that the civil law of Iran has been silent on this matter. Therefore, intentional misconduct or error can be considered as a deliberate guilty or an offense.

Article 391 of the Iranian Trade Act stipulates:
(If the property be accepted and rented without any excuse, the claim will no longer be accepted against the transportation litigant except in the case of deliberate fault or hypocrisy ...)

One of the prominent lawyers believes in the governing of Article 391 of the Commercial Code on Article 230 of the Civil and they believe that hypocrisy and deliberate fault cannot be rooted in normal relationships.

Others have been referred to Article 382 of the Commercial Code, which states that the sender will be able to claim the actual amount of damage allegedly incurred, even if it exceeds the amount of the obligation.

It seems like that in the case of intentional fault of obligated person, the court will be able to modify the penalty clause, although this discretion is explicitly in conflict with Article 230 of the Civil Code, it should be noted, that however today, the principle is not good, and the theory of misuse of rights has been given to prosecutors as a tool to modulated the contractual relations in certain cases, by using them. It should be noted, the possibility of modifying the penalty clause in the recent assumption is based on proofing the obligated person's fault in the breach of contract, and, in the absence of proofing, the judge will not be able to modulate the penalty clause.

**3. ANALYSIS OF PENALTY CLAUSE:**
What has been said so far was related to the modulation of penalty clause. In the other words, match the exorbitant or even very insignificant penalty clause with the justice and fairness. But in this section, the issue is that if part of the obligation is made by a obligated person, is there any possibility of the analysis of penalty clause contained in the contract into parts of the obligations which is done or not? Article 1231 of the French Civil Code stipulates that if a part of an obligation is made but the obligated person is committed to others violations, the court may determine the amount of penalty clause in relation to the part where the offense was committed. In Iran's civil code, there is no an explicit and unambiguous statement regarding the analysis of penalty clause against doing part of the obligation. And perhaps you can say: The term of Article 230 of the Civil Code, which makes it impossible any modulation of penalty clause, includes modulation in general sense which include analysis of penalty clause. Therefore, there is no issue under this heading in the legal doctrine. But in our opinion, the issue of analysis of penalty clause must be sought by the common will of the parties, in spite of the modulation contained in Article 230 of the Civil Code. Therefore, it can be said: Whenever the joint intention of the parties be the full implementation of the condition by the obligated person, in other words, the fulfillment of the obligation be the desired unity of the parties and the implementation of a part of the obligation be worthless for the obligee, the obligated party cannot lead to the analysis of penalty clause. Thus, the courts in such cases also avoids any kind of analysis of penalty clause. However, if the intended obligation be decomposable, in other words, be desirable in many ways, and part of it be worthy for the obligated person, it would seem that the penalty clause can be analyzed according to the value of the obligation's part which is done, and the part of the obligation that has not been implemented. In the effect of the above comment, can be pointed to the vote which is issued by the Tehran City Court Branch as the following:

In a contract between the tea organization and the contractor, the latter was committed to destroying a village house and give it to the tea organization. And in addition to the delivery of the property, the buyer must pay the delayed Rials amount for each day as a penalty clause to the tea organization. Tehran County Court Branch, according to the lawsuit..... file number and dated ....., for possessing the delay of the defendant to fulfill the obligation states that the documentation implies that the delivery of transaction has been conducted at multiple intervals in the year following the obligation. So, because the principle is that for each day of delay in the delivery of each home, the defendant must be properly identified the amount of the claimant's claim in this case. The claim against this amount due to his lack of eligibility is known to be void. Thus, although, the penalty clause was apparently generally conditioned in the form of the violation of obligated person, and apparently the oblige could demand the whole sum of penalty clause in return for non-delivery of a house, even if the other is delivered, but the court imposed the principle on analysis of penalty clause by changing the will of the parties, and by determining the exact date of delivery of each home, it calculated the amount of delay and the amount of the penalty clause.

**3.1 Analysis of Penalty Clause in Jurisprudence:**
In jurisprudence, however, they accepted the modulation of the criminal condition (penalty clause) in two situations:

1. When the debtor performs a part of the obligation, the judge reduces and decomposes the criminal condition towards part of the obligation carried out with respect to the will of the parties. But the existence of a criminal clause has an important benefit in the interest of the creditor, which always puts the burden of proofing a part of the obligation on the obligated person.

2. In cases where criminal law is exaggerated, in jurisprudence, as in the case of French law, it was not possible to modify the condition, but with the changes that were made by the judicial procedure, the legislator eventually conceived to modulation of criminal condition. Therefore, Article 224 of the Civil Code stipulates that ("It is permissible for the judge to modify the amount of the penalty clause stipulated in the contract if the debtor proves that the amount set forth in the condition is exaggerated and exorbitant ") Therefore, the existence of a criminal condition implies that The agreed amount is the real amount of the loss incurred as a result of non-fulfillment of the obligation, so the burden of proving the exaggerated nature of the criminal condition is the responsibility of debtor. And most importantly, that, any dissenting agreement based on the lack of modulation in the case of exaggerating penalty clause is contrary to public order and is void.

   But, there are differences in Iranian law in this regard, however, if the modulation of the penalty clause while contracting or in the subsequent additions is in the mutual agreement of the parties, such a modulation is acceptable, with respect to the common will of the parties. Otherwise, although Article 230 of the Civil Code explicitly makes it impossible to modify the penalty clause, but in exceptional cases, by adding the provisions of Clause 2 of Article 4 of the Civil Code of Civil Covenant, it is also possible to modify mentioned condition in Iran's law.

**3.2. Legal Consequences of Penalty Clause in Iran's Law and Jurisprudence:**
The most important issues are legal consequences of penalty clause, investigating the penalty clause in non-performing of obligation, penalty clause in delay status and its consequences. Article 230 (2) of the Civil Code of the Legislator stipulates that (if while contracting, it was conditioned that if there is a violation) but there is no reference to the type of violation and the fact that whether the mentioned obligation is demandable by paying the penalty clause as damages or not? but since the aforementioned article has been discussed in relation to the damage caused by non-performance of the obligations, however, since the above article has been used in the discussion of damages resulting from non-performance of obligations, it seems that failure to fulfill a commitment, including the failure to fulfill an obligation or a delay in its implementation, the non-implementation of a temporary obligation or delaying its implementation, creates a guarantee itself: In normal cases, the conditional implementation that the supervisor should be do it, has a subordinate entity and it is a desirable individual that if it is lost, it has a special damage. For example, wheat that is given to the buyer at the end of a month instead of at the beginning of May is likely to cause a damages in this delay. For example, it is possible, the customer loses his interest, but it cannot be said that the debtor or obligated person have not fulfilled his covenant, and his delay makes the delivery of wheat useless because the delivery of wheat and doing it at the beginning of May have two distinct desires. Basically, on the basis of this analysis, (damage for Delay in doing the commitment) are deducted from the damage caused by non-fulfillment of the obligation. Therefore, we will examine each of the above cases with regard to their legal consequences.

**3.2.1 The Effect of Penalty Clause in Non-Fulfillment of Obligations in Iran's Law and Jurisprudence:**
If the penalty clause be in the status of non-fulfillment of obligations, then what is

meant by the parties by the inclusion of the mentioned condition in the contract, and their will is based on them, is the fact that, in accordance with the provision of the contract, the claim for the penalty clause is contradictory to the implementation of the main obligation because, as stated before, the nature of the penalty clause is a damage, so all the rules for claiming damages in a discussion regarding the damages resulting from the failure to fulfill obligations, with the exception of proving the entry of losses is necessary to observe, and one of these general rules, which is inferred from the spirit of the relevant laws, is that the damage is a substitution of fulfilling obligations. Therefore, the oblige is free to study either the penalty clause or the implementation of the main obligation. Because the main intention of the parties at the time of the conclusion of the contract is the implementation of the main obligation and the determination of the penalty clause before the payment of the damage is a guarantee of the fulfillment of the obligation. Therefore, the obligee can ask for implementation of main obligation instead of claiming the penalty clause, but as long as the obligated person is committed to the obligation, such an option is discarded. The Supreme Court Branch (6) in the vote (290715/9/21) to confirm the above opinion declares: If someone on a sheet initially pledges to attend one day, for arranging the lease at the official office as provided in this sheet, in the event of a breach, shall pay a sum by the fact that, during his liability for damages of nun-fulfillment of obligation has been foreseen and determined, and no other right to the oblige party is required except the penalty clause.

Therefore, if the penalty clause be for non-fulfillment of obligations, it is not possible to claim both cases (penalty clause and principal obligation) for the obligee. Because the damage for non-fulfillment of obligations is the substitution of the principle of obligation and does not fit into it. In the jurisprudence, the existence of (random change) or the contractual condition of the contract, cannot be a condition between the authorities. Therefore, the creditor cannot claim the penalty clause until he is committed to fulfilling the main obligation, and the obligated person cannot refuse to continue the main obligation and pay the penalty clause.
But in France, the only forecasted right for a damaged party of the breach of contract has the right to claim damages, although compelled to implementing the obligation on the basis of (fairness) was subsequently enter into the French law but it should be noted that the issuance of a warrant to enforce doing an obligation or refraining from a breach of contract is entirely related to the court, and the injured party cannot claim it as a right. Therefore, the court will consider several factors in its opinion, such as non-compensation of losses completely, in the event of the issuance of a warrant to pay damages, and failure to create Osr va Haraj for the obligated person, if a warrant is issued for doing the obligation or refraining from the breach of the obligation.

**3.2.2 The Effect of Penalty Clause as a Delay in Fulfilling the Obligation:**
The delay in fulfilling the obligation is realized when, firstly, the obligation is chargeable; secondly, the obligation is not fulfilled; thirdly, fulfillment of the obligation is still possible.

In general, it should be said that the time specified in the contract is sometimes a commitment: that is, the fulfillment of an obligation at a given date is a desirable and unobtrusive one. Therefore, the provision of a time is like a failure to perform the obligation, since then the obligation is not enforceable. As a result, the delayed loss is merged with the non-fulfillment of the obligation and the creditor can take the loss of non-fulfillment of the obligation from the debtor, due to the expiration of the date. For example, when someone ordering food for a certain day, such as a wedding day, after that at the next day, fulfillment of the obligation will not be work. One way of identifying whether the date specified in the contract is an obligation's condition or has a subsidiary aspect? How to hold is the penalty clause. If it is for non-fulfillment of an obligation, it is indicative that after the time, the obligation is not capable of doing; on the contrary, if the obligation is to delay in the fulfillment of the obligation, it becomes apparent that by passing the time, the principle of obligation has also the ability to implement. Therefore, based on the common will of the parties, it can be said that the determination of the penalty clause as a delay in the implementation of the obligation implies that the main obligation must be fulfilled or that the purpose of the inclusion of this condition is that the contract should not be delayed. So, if the judge announces by changing the common will of the parties that the purpose of parties from the penalty clause condition is providing the delayed damage and paying the penalty clause will be charged with the implementation of the principle of the obligation and will not prevent the implementation of the original commitment.

**3.2.3 Penalty Clause in Addition to Damages:**
The assumption of the matter under discussion is that whether the obligee can make a condition for the obligated person to pay an amount as penalty clause in addition to compensate the damages resulted from nun-fulfillment of obligation? The above question has not been raised in the judicial procedure and in civil law, in any case the legislator has not referred to demand the penalty clause in addition to the damage. So, whether the contract of the parties under the framework of Article 10 of civil law can be a reason of the validity of such a condition? or is there any reason for the constraint of the will of the government? Perhaps at first it would seem that such a condition that actually reflects the profiteering of the creditor, according to the provisions of Article 230 of the Civil Code, which the court does not have the right to modify the penalty clause, then the creditor's profiteering to implement the rule of contractual liability is not contrary to law. On the other hand, the historical background of such conditions was to guarantee the obligations that lacking a performance guarantee, so it was considered legitimate. But the above question requires the expression of the legal nature of the conditional penalty clause. As stated earlier, although one of the objectives is the inclusion of a conditional penalty clause in the guarantee contract of the fulfillment of obligations, and even in countries where the guarantee penalty clause is void, this feature is implicit in the penalty clause. However, in all legal systems it is accepted that the nature of the penalty clause is (the damage is agreed upon by the parties on the basis of the contract). If the article (230 of the Civil Code) has been also brought in the damages discussion resulting from non-fulfillment of obligations. In addition, at the top of the mentioned article, the legislator referred to the term (as damage) and thus cannot be considered as a tools for creditor's profiteering from the obligated person. On the other hand, the argument declares that in accordance with Article 10 of the Civil Code the parties in their contract can include clauses that are not in conflict with the law and that their void must also be specified (Articles 232 and 234 of the Civil Code) Therefore, the mentioning of Article (230 of the Civil Code) on penalty clause ((as damages)) is not a reason for invalidity of the criminal penalty clause, so the penalty clause condition is, in addition to the damage, valid and correct. {Katouzian: 316: 1388}

It can be said that one of the condition which is necessary for the validity of condition while contracting, is the conditions related to its non-opposition of general order and good morality (article 975 of civil code), so the contract of penalty clause as a (punishment) under the principle of (the legality of offenses and penalties) is the imposition of any penalty on the legislator, it is contrary to public order and is deemed to be invalid, therefore the dominant face of the obligation is ((Damage)). Although the criminal aspect is implicit. Therefore, it is not possible to adding the above condition to the implementation of the principle of obligation except in the event of penalty clause against the delay in the fulfillment of the obligation. Therefore, in our view, the penalty clause condition cannot be accepted, in addition to the payment of the contractual damages. However, the issue that its plan is required is that is there the possibility of claiming damages excess of penalty clause, if the losses incurred as a result of non-fulfillment of the obligation be exceed the amount of the penalty clause? According to the explicit provision of Article 230 of the Civil Code, which makes it impossible to modify the penalty clause, and on the other hand, the its exceptional modulation in clause (2) of Article 4 of the Civil Liability Law is merely provided for an excessive penalty clause. And it cannot be generalized it to the case of which the amount of the appointed penalty clause is insignificant, so it can be said; it is not possible to claim additional damages on the amount of the penalty clause. In French law, if the agreed amount of damages has the aspect of fixing the damages, then the amount is necessarily stated in the order, and therefore the possibility of claiming damages for the loss is excluded.

One can say that the determination of the penalty clause, in addition to the damage, which is itself a symmetry of the guarantee and threatening feature of condition, in which case, the claimant should preference accordance with the observance of general conditions related to claiming damages for demanding actual damage, which in this case, the court will state the actual damages in their sentence. On the other hand, in jurisprudence, however, this mentioned issue, like the legal system of Iran and France, has not been raised as such, but it can be said that in the rights of such countries, the penalty clause has been considered (under the heading of "random replacement") in the case of Damage. Therefore, it is impossible to express the nature of the criminal aspect of the condition. In particular, under Article 225 of the Civil Code, in the Egypt, only the oblige can claim excess damages if the damage occurred to the creditor be more than the appointed penalty clause and the debtor intentionally or due to the fault be committed to the breach obligation. {Alsanhoury: 1412: 878}

**4. RESULTS AND FINDINGS:**
The present paper deals with the subject of modulation and analysis of the penalty clause in Iran's law and the jurisprudence, which the results summarizes as the following:

One of these conditions, which the parties are inserted while contracting with the aim of ensuring the implementation of commitments, is penalty clause condition which is of great importance in jurisprudence and law of Iran.

In general, in all legal systems as well as in jurisprudence, the nature of the penalty clause is damages, which may be included in the main contract or separately. Therefore, about the contract's provision it can be said that there is no contract for the provisions to remain unchanged. But by considering the causes and factors mentioned above, each contract may be changed under the influence of various voluntary or compulsory variations and so the modulation of the contract by its reason can be divided into the contractual; legal and judicial.

General conditions of penalty clause are the same as of Article 190 of the Civil Code, and the special conditions are the provisions of Article 233 of the Civil Code. In general, the nature of the penalty clause in all legal systems is damages which is determined by the parties to the contract. Concerning the intentional fault of the obligated person, the court will be able to modulate the penalty clause, which is in conflict with Article 230 of the Civil Code. Today, however, the principle of good faith and the theory of abuse of the right has been given to prosecutors as a means to modulate the contractual relationships in certain cases.
there is no an explicit and unambiguous statement regarding the analysis of pen-

alty clause against doing part of the obligation. And perhaps you can say: The term of Article 230 of the Civil Code, which makes it impossible any modulation of penalty clause, includes modulation in general sense which include analysis of penalty clause. Therefore, there is no issue under this heading in the legal doctrine. But in our opinion, the issue of analysis of penalty clause must be sought by the common will of the parties, in spite of the modulation contained in Article 230 of the Civil Code.

In jurisprudence, however, they accepted the modulation of the criminal condition (penalty clause) in two situations:1 When the debtor performs a part of the obligation, 2 In cases where criminal law is exaggerated, that the legislator eventually conceived to modulation of criminal condition.

Regarding the possibility of modulating the penalty clause it should be said that , under the Article 230 of the Civil Code, provided that if the penalty clause condition has been included in the contract, the judge will not have the discretion to modify it, and if the actual damage is less than or more than the required amount, the defendant will be fined to pay the agreed amount. {Katouzian: 70: 1380} In this way, it is considered that necessity of compensate for all losses and to establish a balance between the damages and the amount of penalty clause is a supplementary principal, and the parties are able to agree on its amount. So, only when the implementation of a part of the obligation is effective in modifying it, that the provisions of the contract indicate the effect of the part of obligation in penalty clause, and otherwise the obligated person will be liable for the payment of the penalty clause.

Regarding this question that whether there is possibility of demanding excess of penalty clause or not? It should be said that penalty clause condition cannot be acceptable in addition to pay contractual damage. And also, in cases in which the losses incurred is more than penalty clause as a result of non-fulfillment of obligation, the possibility of demanding excess damages on penalty clause according to an explicit provision of Article 230 of civil law which know the modulation of penalty clause impossible and its exceptional modulation in clause (2) of Article 4 of the Civil Liability Law is merely provided for an excessive penalty clause. And it cannot be generalized it to the case of which the amount of the appointed penalty clause is insignificant, In French law, if the agreed amount of damages has the aspect of fixing the damages, then the amount is necessarily stated in the order, and therefore the possibility of claiming damages for the loss is excluded.
Acknowledgments: Thanks to all the loved ones who have come along in this way, as well as the special thanks to the distinguished professor, Dr. Sherafat Peyma, who have helped in gathering this article. Be successful in every single stage of life.

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